

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUDY M. GALLARDO,)
vs.)
Petitioner,)
vs.) Case Number CIV-10-479-C
OKLAHOMA DEPARTMENT)
OF CORRECTIONS,)
vs.)
Respondent.)

ORDER ADOPTING REPORT AND RECOMMENDATION

On May 11, 2010, Magistrate Judge Gary Purcell entered a Report and Recommendation (“R&R”), recommending Petitioner’s Motion for Leave to Appear in Forma Pauperis be denied. Judge Purcell noted that Petitioner had sufficient funds in his account to pay the required \$5.00 filing fee. On June 30, 2010, after hearing no objection from Petitioner, the Court adopted the R&R. Then on July 16, 2010, Petitioner filed a Motion for Extension of Time to object to the R&R. Treating Petitioner’s motion as a request to reconsider the Court’s Order, the Court granted the extension of time. Petitioner has now filed his objection to the R&R and the Court will consider the issue de novo.

In his objection, Petitioner argues that he cannot pay the filing fee as he lacks sufficient funds. However, Petitioner offers nothing other than his conclusory statement in support of this argument. Petitioner asserts that he has included a copy of a statement from a prison official; however that document was not included in the material filed with the

Court. Even had Petitioner included the documentation, the result would not change. Petitioner's request to proceed in forma pauperis ("IFP") is governed by 28 U.S.C. § 1915. Paragraphs (b)(1) and (2) of that statute direct the Court to consider either the average monthly deposits into Petitioner's trust account or the average monthly balance of Petitioner's trust account for the prior six months. On the date Petitioner made his IFP request, his account had a balance of \$60.79. Thus, Judge Purcell's determination that Petitioner had adequate resources to pay the required filing fee was correct.

For the reasons set forth herein, the Court ADOPTS the May 11, 2010, Report and Recommendation and DISMISSES Petitioner's Petition without prejudice to refiling. A judgment will enter accordingly.

IT IS SO ORDERED this 23rd day of August, 2010.



ROBIN J. CAUTHRON
United States District Judge